

QUACH (Migration) [2022] AATA 1387 (29 March 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr NGUYEN THONG QUACH
VISA APPLICANT:	Mrs THI MY LY LE
REPRESENTATIVE:	Mr Huu Loc Nguyen
CASE NUMBER:	2006104
DIBP REFERENCE(S):	BCC2019/1791388
MEMBER:	Peter Emmerton
DATE:	29 March 2022
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 29 March 2022 at 2:45pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – genuine and continuing relationship – validly married in home country – lack of supporting information provided to department – limited financial, social and household aspects while living in different countries – financial hardship and COVID-19 travel restrictions – nature of commitment – sponsor’s physical and mental health – oral evidence, statutory declarations and witness statements – credible and persuasive evidence – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cl 309.211(2), 309.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 February 2020 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 11 April 2019 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the couple were in a genuine spousal relationship.
4. The review applicant appeared before the Tribunal, on 29 March 2022, via video to give evidence and present arguments. The Tribunal also received oral evidence, via telephone from the visa applicant, Ms Thi My Ly Le. In addition, the review applicant's father-in-law Mr Le Chau Minh and his sister-in-law Ms Le hi My Len gave evidence via video.
5. The review was conducted with the assistance of a translator fluent in the Vietnamese and English languages.
6. The review applicant was represented in relation to the review.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

8. CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the couple is in a genuine spousal relationship as defined by section 5F of the Act.
10. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in so doing, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their particular circumstances.
11. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department

12. Whether the parties are in a spouse or de facto relationship

13. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

15. Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The delegate accepted a Marriage Certificate as evidence that the couple were legally married. The Certificate is dated 17 December 2018, issued by People's Committee of Tran De District, Vietnam. The Tribunal also accepts this evidence and has viewed the documents and certified written translation. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

17. Are the other requirements for a spousal relationship met?

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18. In forming an opinion whether they are in a spousal relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A which is attached to this decision.
19. The applicant lodged a valid application for a Class UF Partner (Provisional) and BC Partner (Migrant) visa on 11 April 2019 on the grounds of being in a spousal relationship with an Australian citizen, Mr Nguyen Thong Quach.
20. The visa applicant is a female Vietnamese national by birth, who has declared 1 previous marriage relationship with no children. [Date of birth]. The divorce decree was also provided.
21. The sponsor is an Australian citizen by grant, who has declared 1 previous de facto relationship resulting in 2 children. The relationship ended in 2016. This was corroborated at the hearing,
22. It is claimed that the review applicant and visa applicant met in Australia 21 September 2017 when the visa applicant was visiting Australia.
23. The departmental travel records establish that the review applicant travelled to Vietnam 2 times post meeting, once prior to the marriage, once at the time of the wedding. He returned to Australia on 14 January 2019 after the wedding celebrations on 5 December 2018. The marriage was registered on 17 December 2018.
24. The Tribunal accepts that for the period of time post marriage, the couple cohabited, this was tested during the hearing with the couple and witnesses and supported by the various Statutory Declarations, (5), made by friends and family, received by the Tribunal prior to the hearing.
25. The review applicant stated that the reason he had not travelled to see his wife in 2019 was financial hardship. The original mid-year trip was rescheduled for early 2020, unfortunately

the Covid-19 pandemic meant this was not possible. The Tribunal accepts this as fact and notes that the review applicant exists on government financial benefits since a workplace accident.

26. According to departmental records the visa applicant has travelled to Australia on 4 occasions the first visit was 2008 and she departed Australia on 20 October 2017 on the most recent visit. This was corroborated at the hearing.
27. The Tribunal has considered the documentary evidence provided to the Department and the Tribunal. The Tribunal, as previously stated, has had the benefit of taking considerably more evidence from the sponsor and his parents in law at the hearing, as well as oral evidence from the visa applicant. The Tribunal was surprised by the scant information provided to the department in the original visa application. The Tribunal found the lack of supporting information provided to the department was not what could reasonably be expected of a competent practitioner. It also expressed a view that had the information provided to it, been provided to the department, at time of application, the review may not have been necessary.
28. It explored this with the parties during the hearing and as to why such a poor application was produced which left the department with little chance to arrive at a favourable outcome. The Tribunal notes that the current representative who was appointed recently was not associated with the original application. The Tribunal expressed its' concern that the applicants had not been well served by the original representative. It also stated that this would not have any influence on the Tribunal's decision during this review process.
29. The Tribunal found those presenting evidence to be credible and persuasive witnesses. Answers were provided in what appeared to be an honest and candid fashion without any apparent obfuscation or collusion. The Tribunal has considered all aspects of the relationship.
30. The Tribunal has determined that there is a demonstrated clear mutual commitment to a shared life together. This is initially indicated through the fact the couple are married and they have declared their marriage to a government body in Vietnam. It is also indicated through the fact that despite being separated for 3 years, the Review Applicant and Primary Visa Applicant appear to have remained mutually committed to each other. They profess that the love for each other is as strong as ever and has survived the time they have been forced to spend apart. This was explored during the hearing and verified by the witnesses and Statutory Declarations.
31. The Review Applicant and Primary Visa Applicant displayed a consistent understanding of each other's lives and show a genuine mutual interest in one another. They appear to support one another in all aspects of their life, that is, financially, socially, and emotionally in spite of the limitations imposed by distance. The relationship is in the view of the Tribunal both genuine and continuing.
32. There is no evidence before the Tribunal that the visa applicant and the review applicant have any intention to live separately apart on a permanent basis. The current separation is imposed upon them by the confluence of the Covid 19 pandemic and the initial visa refusals by the department. The Tribunal observes that the current Covid-19 pandemic wave is raging out of control in Vietnam.

33. Financial Aspects of the Relationship

34. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered joint asset ownership, joint liabilities, pooling of financial resources, legal obligations and the sharing of daily household expenses.

35. In relation to any joint ownership of real estate or other major assets, the Tribunal has determined that the couple do not jointly own any major assets or real estate. This is not in the opinion of the Tribunal unusual for a couple of modest means, currently housed in two different countries, planning to live together in Australia.
36. The Tribunal accepts the documented evidence, (a range of money transfer receipts emanating from Adelaide South Australia), that the review Applicant has assisted the primary visa applicant's expenses via his money transfers totalling AUD \$18,000 post marriage until current date. The Tribunal has been provided evidence that the visa applicant is able to financially support herself with a substantial bank balance. It also accepts that the sponsor wishes to provide support for his wife even if it is not financially necessary. Verbal evidence was proffered by the sponsor and the visa applicant and the visa applicant during the hearing.
37. The Tribunal received no evidence that the couple have any joint liabilities.
38. The Tribunal accepted evidence from the couple that the visa applicant was saving the remitted monies for their life together when she relocates to Australia. It is noted that the review applicant no longer owns a dwelling post separation from his previous partner.
39. The extent of any pooling of financial resources, especially in relation to major financial commitments. The Tribunal again notes, that money transfer receipts were presented demonstrating a substantial amount of money transferred from the sponsor to the visa applicant. It also appreciates that it is not possible to establish a joint bank account with a foreign national, even if she is his wife, as a direct result of Australia's stringent "money laundering" legislation.
40. Whether one person in the relationship owes any legal obligation in respect of the other. The Tribunal has determined that aside from the usual legal obligations associated with a marriage, the couple have not provided any evidence to indicate any additional legal obligations.
41. The basis of any sharing of day-to-day household expenses. The Tribunal acknowledges that the couple have lived apart for a considerable period of time post marriage and will continue to do so until the review applicant is able to bring his wife to his home in Australia. Therefore, there is little verifiable evidence of day to day sharing of household expenses aside from the substantial financial contribution made by the sponsor to his wife, coupled with the statements made by both parties relating to the financial support. In addition, verbal evidence was given by the visa applicant and the review applicant that when the review applicant was in Vietnam prior and post marriage, he regularly contributed substantially to the day to day living expenses of the household.
42. The Tribunal places substantial weight on the evidence in support of the financial aspects of the relationship.

43. Nature of the Household

44. In relation to the nature of the household aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
45. Any joint responsibility for the care of children. The Tribunal notes that the couple have not commenced a family at this stage. Neither have responsibility for young children. It was clear from questioning the couple individually, that future planning has some focus upon having children as a couple.

46. The living arrangements of the visa applicant and the sponsor were discussed. The couple have principally been separated by geography post their marriage for substantial periods of time. The separation is not of their making as previously stated.
47. Any sharing of responsibility for housework. The Tribunal notes little opportunity has existed to share household responsibilities other than during their brief cohabitation in Vietnam. Traditional roles appear to have occurred during periods of co-habitation which were outlined during the hearing and reinforced by the statements made by the sponsor's and the visa applicant's friends and family in their Statutory Declarations and statements. The Tribunal accepts the photographs provided showing cooking and household tasks being shared as corroborative evidence.
48. The Tribunal places only moderate weight on the cumulative evidence presented in relation to the nature of the household due to the extraordinary external circumstances inflicted upon the couple.

49. Social Aspects

50. In relation to the social aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
51. The review applicant and primary visa applicant claimed that they present themselves to society as a married couple and as a couple in a committed relationship. The Tribunal has formed the view that this is reasonable to accept from the fact that the review applicant and primary applicant have provided photographic evidence of them in a diverse range of different social settings in the presence of family and friends. The Tribunal has carefully examined the photographs showing the couples wedding and associated celebrations, as well as the diverse range of social gatherings with a substantial and diverse group of friends and family present. It has in addition accepted the evidence provided demonstrating the couple holidaying together in the form of airline ticket receipts and hotel receipts.
52. They claim that in the visa applicant's community in Vietnam, as well as in the relevant community and family in Australia, the couple are known to be a married couple. This is demonstrated in the Statutory Declarations and statements presented to the Tribunal prior to the hearing and the witnesses at the hearing. In the Tribunal's past experiences of this culture, if the community did not in fact view the couple as married, they would have been shunned for having an affair out of wedlock. This would be particularly poorly viewed by an in situ traditional Vietnamese community.
53. The review applicant's witnesses, (father-in-law and sister-in-law) testified in writing and at the hearing that they were cognisant of the marriage of the review applicant and primary visa applicant. They additionally commented upon their concern for the individuals in their forced separation and the sadness they felt relating to the situation. This clearly indicates that the review applicant's and primary visa applicant's marriage is recognised outside of their family and inside the extended families. This fact is also obvious from their marriage certificate, where witnesses attested to their marriage.
54. The Tribunal places substantial weight upon the cumulative evidence provided in support of the social aspects of their relationship in combination with the circumstances of the relationship participants.

55. Nature of the Commitment

56. In relation to the nature of the persons' commitment to each other, the Tribunal has considered the following.

57. The duration of the relationship. The Tribunal was presented with a range of testimony, both verbal and written, clearly showing that the relationship evolved over a period of time from 2017 although not initially acknowledged or publicly displayed. because of a clash with normative social expectations associated with marriage. Major issues such as when the relationship commenced, the wedding date, the subsequent living arrangements over time and the understanding of the respective families and their desire to see the couple reunited and have a happy life together, have all been detailed and the range of accounts cross-reference appropriately with written and verbal evidence.
58. The length of time they have lived together. As previously stated, the couple have not lived together for lengthy periods of time, due to circumstances the Tribunal accepts are out of their control. It accepts that they lived together as man and wife post the marriage, for the brief periods of time available to them.
59. The degree of companionship and emotional support that the persons draw from each other. The Tribunal was convinced by the testimony of the couple, which was supported by the various Statutory Declarations that the relationship is mutually emotionally nourishing. The demeanour of both the witness and the sponsor demonstrated to the Tribunal the emotionally genuine nature of the relationship and the couple's desire to progress their lives together.
60. The Tribunal has been provided medical reports and psychological assessments of the sponsor. It is completely satisfied by the evidence recorded by the various practitioners that they assess the separation as deleterious to the sponsor's physical and mental health and wellbeing. The Tribunal is in no doubt that substantial mutual emotional support is provided to the visa applicant and the sponsor and accepts that this is likely to continue into the future when they are able to reunite.
61. The Tribunal determines that the substantial evidence provided to demonstrate regular ongoing communication between the visa applicant and the sponsor further strengthens the body of evidence supporting the genuineness of this relationship. Evidence was presented to demonstrate to the Tribunal that a range of communication devices and methodologies are regularly employed. This is further corroborated by witness statements.
62. Both the sponsor and the visa applicant were able to demonstrate substantial knowledge about each other, their daily activities, occupations and their future plans. The Tribunal notes that whilst the couple have a clear understanding and appreciation of each other's perspective on important issues they didn't always have an identical view. The couple expressed mutually compatible knowledge regarding each other's family circumstances and extended family structures and relationships.
63. The Tribunal places substantial weight upon the cumulative evidence provided in support of the couple's commitment to each other.
64. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
65. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
66. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

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69. DECISION

70. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309.211 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Peter Emmerton
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).